# Book Review

**Ewa Bagińska (ed),** *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems* Ius Comparatum – Global Studies in Comparative Law Vol 9 (Springer International Publishing AG Switzerland 2016) 486pp. ISBN 978-3-319-18949-9.

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Awards for damages have long been essential for the protection of human rights. More than 250 years ago, English courts gave generous compensation to editors and printers who had been unlawfully arrested in an attempt to close down the critical reporting by a journal called the *North Briton* (as in *Huckle v Money* (1763) Wilson's King's Bench and Common Pleas Reports 205).

The 19th International Congress of Comparative Law, held in Vienna in 2014 and organised by the International Academy of Comparative Law, gave an opportunity for stock-taking on more recent developments. The present volume is based on papers presented to this Congress. They are arranged in the form of country reports on how public authorities can be held liable for human rights violations. They represent 15 European legal systems, namely those of Croatia (written by Saša Nikšić), Czech Republic (Pavel Šturma and Veronika Bílková), Estonia (Ene Andresen), France (Xavier Philippe), Germany (Andreas von Arnauld), Greece (Ioannis Stribis), Ireland (Noelle Higgins), Italy (Graziella Romeo), Netherlands (Jessy M Emaus), Norway (Bjarte Thorson), Poland (Michał Balcerzak), Portugal (Maria José Reis Rangel de Mesquita), Slovenia (Samo Bardutzky), Turkey (Zeynep Oya Usal Kanzler) and the UK (Merris Amos), plus those of Israel (Iris Canor, Tamar Gidron and Haya Zandberg) and the USA (Jacques deLisle). An additional report (Nina Półtorak) deals with the law of the European Union. To this, the editor has added a short introduction (1–8) and comparative reflections (443–478).

In this sense, the book starts more as 'Damages for Human Rights Violations in European National Laws' than as a global study in comparative law. But the editor has taken various steps to move beyond individual domestic perspectives. The book reproduces a questionnaire which was sent to all contributors, presumably after the congress. It does not serve as an outline but raises points which

most contributors have duly attempted to cover, to different degrees and in differing depths. This questionnaire focuses on structural issues and grounds of liability, but also includes specific questions on compensation for what the editor calls 'historical injuries', and 'systematic and gross violations' of human rights by state organs.

A main impression which emerges from this collection is diversity – not only of different legal traditions and constitutional arrangements, but also of different concerns and priorities of the different legal systems, and the authors who describe them. Some reports (for example, the one on the Czech Republic) stay very close to the questionnaire and use it as an outline. Other reports (such as the German report) focus more on explaining to the foreign reader the complex system of general state liability, and present some issues which are particularly relevant for human rights cases. One report (UK) has a very limited scope, namely state liability under sec 8 of the Human Rights Act 1998, and the interaction of the – presently rather limited – UK case law under this provision with the ECtHR case law under art 41 ECHR, leaving aside the long English tradition mentioned at the outset of this review and modern tort-based state liability for negligence and for breach of statute. Others, such as the Slovenian report, strike an even balance between providing answers to the questionnaire and presenting issues which are particularly relevant in their domestic legal system. Diversity extends to different citation systems, and bibliographies (three entries for the Norwegian report, 86 for the German). In one case, diversity also extends to language: the French report is written in French.

This flexible approach allows room for those who want to present peculiarities of different legal system in different ways. Many topics surface in the report, such as defamation (Ireland 171; Norway 281); infringement of privacy (for example, Norway 281f); HIV (or Hepatitis C) infections (Ireland 175f; Slovenia 336f); victims of warfare (Turkey 359–362); other cases of death and/or personal injury (Croatia 22f; Norway 278); wrongful detention (Poland 298ff; Turkey 362f; UK 387f); or inhuman conditions of detention (Italy 226). Several contributions (for example, Netherlands, 244ff), and also the comparative conclusions, relate to liability of non-state actors. Some cover immunity of foreign states in domestic courts (US 395ff; Germany 116ff).

On the other hand, there are some issues which are specific to compensation claims for human rights violations and which attract little if any attention in the present book. Violations of procedural rights such as those enshrined in art 5 paras (2) – (4) and art 6 ECHR can easily affect the outcome of proceedings: if the judge was not impartial and independent or if a defendant in criminal proceedings had no access to legal representation, or to interpretation of a court language which he or she does not understand, or was not allowed to interrogate witnesses

etc, any assumption that this violation had no impact on the outcome of the proceedings would effectively negate those rights. But this is how regular rules on pleading and proof operate: under these, the claimant will have to prove that the outcome would have been different if the human right had not been violated. One solution is the award of damages for 'lost opportunities', or the chance of having won a more favourable outcome, which have frequently been awarded by the ECtHR since 1980 (*König v Germany* (Article 50) 10.3.1980, (no 6232/73, § 19). All I could find on this important question is some short information in the Estonian report that courts cap damages for violation of tendering procedures to reliance loss (56) – which may or may not mean that normal burden of proof rules are applied. A related question relates to lawful conduct as a hypothetical cause: if a state has violated for example the liberty of a person by an unlawful detention without warrant, will it be heard with the defence that such a warrant could easily have been obtained in the present case?

Both of these specific human rights issues in compensation are related to causation, on which the questionnaire contains one general question: 'What doctrine of causation is applied?'. This question is ignored in some country reports, or the answers are well hidden – the rather short index is no help, as it contains no entry on 'causation'. Some reports contain two or three sentences which struggle to rise above commonplaces (Croatia 17; Portugal 317). Some reports explain general causation rules, such as the 'but for' test plus variations on remoteness, foreseeability and scope of the rule as limiting factors (for example, Estonia 55f). The Greek and the Norwegian reports stand out for being more detailed on causation. We learn inter alia that Greek courts relax proof requirements when assessing lost profit – although it is not stated whether this is peculiar to human rights law cases (157). The editor's comparative analysis on causation issues is limited to this sentence (467): 'All elements must be causally linked to the unlawful/faulty act or omission of the actor.'

While the topic of causation gets lost between questionnaire and conclusions, another important topic receives the deserved treatment. Compensation for violation of the right to a trial 'within a reasonable time' (as in art 6 para (1) ECHR) has proven to be a very difficult issue. Sometimes a specific loss can be proven, for example if the claimant has eventually won lengthy civil proceedings but cannot enforce the judgment because the defendant becomes insolvent immediately after the judgment becomes final (as in ECtHR *Martins Moreira v Portugal*, 26.10.1988, no 1137/85, § 65). But in most cases, no pecuniary loss can be proven, and in many cases, not even the loss of a chance can be established. The present book shows how a long dialogue has emerged between the ECtHR's insistence that compensation must be provided in such cases, and the eventual response of domestic laws, mostly through legislative intervention and in a few cases through

courts creating specific remedies which mostly provide fixed standards based on the excessive duration (see, for example, Germany 119f; Netherlands 247f; Poland 296–298, Slovenia 335f). In a good resume, Bagińska even holds this out as a main example for interaction between Strasbourg and domestic courts (at 466).

The book contains similarly valuable observations and comparative conclusions about 'historical injustices' and 'gross and systematic violations'. While the replies show that these categories are not easy to separate, reports and conclusions demonstrate that many countries struggle to deal appropriately with compensation for mass violations of human rights in times of war, political upheaval or change. Bagińska notes that many legal systems will strive to provide some compensation for historical cases where normal claims will often have prescribed, but will also often attempt to cap compensation for gross and systematic violations in the fear that the state will be financially overburdened with a multitude of claims, taking examples mostly from historical cases (473–475).

The reader will also find much useful information and discussion on structural issues, the public/private law divide, elements of a claim, and the relevance (and very diverse meaning) of 'fault'. And while more could have been gained from a study with a consistent methodological approach (on which we learn nothing beyond the assurance that 'comparative methodology is to be applied', at 8), and with a larger common basis of comparison supplied by the national reports, the editor has risen well above and beyond the diversity of national reports as presented to the 2014 Congress. This book is a valuable reference for further academic study.